Duran-Jurado v. Keisler, No. 06-73258

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

While I agree with the Court that Duran-Jurado's equal protection claim fails and agree with its decision to remand his cancellation of removal claim, I do not agree with its analysis in two respects.

I

I would hold that we do not have jurisdiction to hear Duran-Jurado's equal protection claim because he does not have standing; I would not reach the constitutionality of the 1986 naturalization regime, see 8 U.S.C. §§ 1432, 1433 (1986) or the Child Citizenship Act of 2000, see 8 U.S.C. § 1433 (2002).

A court must always satisfy itself that it has jurisdiction before proceeding to the merits of a case. See Valley Forge Christian College v. Ams. United for Separation of Church & State, 454 U.S. 464, 471 (1982). Here, Duran-Jurado does not have standing to bring his own claim because (1) his injury was caused by the inaction of his adoptive parents and is not fairly traceable to the challenged naturalization scheme; and (2) we cannot grant Duran-Jurado citizenship to redress the harm. See Allen v. Wright, 468 U.S. 737, 751 (1984) (holding that Article III standing requires (1) "a personal injury;" (2) "fairly traceable to the defendant's allegedly unlawful conduct;" and (3) that the injury is "likely to be redressed by

the requested relief").

Nor can Duran-Jurado bring a third party standing claim on behalf of his deceased parents because his injury cannot be redressed by this Court based on his parents' equal protection rights. See Singleton v. Wulff, 428 U.S. 106, 113 (1976) ("If the physicians prevail in their suit [brought on behalf of women who want abortions,] to remove this limitation, they will benefit, for they will then receive payment for the abortions."). In any event, Duran-Jurado's parents' claim fails for lack of traceability and redressability. See Allen, 468 U.S. at 751. Moreover, because Duran-Jurado's parents are dead, any psychological harm that they might have suffered due to unequal treatment is moot. See Center for Biological Diversity v. Lohn, 483 F.3d 984, 987-89 (9th Cir. 2007).

For the foregoing reasons, I would dismiss on jurisdictional grounds, rather than deny, Duran-Jurado's equal protection claim.

II

I agree that Duran-Jurado's application for cancellation of removal was properly remanded; the IJ erred by relying solely on the plea. However, I do not agree that we should determine whether his conviction is an aggravated felony under Taylor v. United States, 495 U.S. 575 (1990); I would permit the BIA to consider this question on remand.

The majority points out that it would save judicial resources for us to decide this question and that the aggravated felony determination does not fall within the agency's expertise. But, the removal proceedings are the responsibility of the agency and we should remand this question in accordance with customary practice. See INS v. Orlando Ventura, 537 U.S. 12, 16 (2002). Saving judicial resources, while admirable, does not rise to the level of a "special circumstance" which allows us to disregard the ordinary remand rule. See Gonzales v. Thomas, 547 U.S. 183, 185, 187 (2006) (holding that due to the absence of a "special circumstance" we improperly decided a question that is the responsibility of the Attorney General and his delegates). Therefore, we should have given the BIA the opportunity to review this question in the first instance.

For the foregoing reasons, while I agree with the Court's decision to remand, I must dissent from its aggravated felony determination.